

Original

DOCKET FILE COPY ORIGINAL

RECEIVED

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

SEP - 3 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	FCC 02-201
)	
Amendment of Section 73.202(b),)	MM Docket No. 98-112
Table of Allotments, FM Broadcast Stations)	RM-9027
(Anniston and Ashland, AL, College Park,)	RM-9268
Covington, and Milledgeville, Georgia))	RM-9384

To: The Commission

STATEMENT FOR THE RECORD, MOTION FOR PROTECTION,
AND NOTICE OF RESUBMISSION OF
PETITION FOR RECONSIDERATION AND
SECOND MOTION TO REOPEN THE RECORD
AND NOTICE OF RESUBMISSION OF
MOTION TO FOR LEAVE TO FILE SUPPLEMENT

PRESTON W. SMALL
Timothy E. Welch, Esq.
Hill and Welch
1330 New Hampshire Ave., N.W. #113
Washington, D.C. 20036
(202) 775-0070
(202) 775-9026 (FAX)
welchlaw@earthlink.net

No. of Copies rec'd
List ABCDE

074

September 3, 2002

Preston W. Small (Mr. Small), by his attorney, hereby submits the following statement concerning Mr. Small's August, 19, 2002 *Petition for Reconsideration and Second Motion to Reopen the Record* concerning the Commission's July 25, 2002 *Memorandum Opinion and Order (MO&O)*, FCC 02-201 which denied Mr. Small's *Application for Review*. In support whereof, the following is respectfully submitted:

1) The subject *MO&O* was released to the public on July 25, 2002. The *MO&O* does not indicate that the order would be published in the Federal Register nor does the *MO&O* indicate that the order would have an effective date which differed from the release date of the *MO&O*. In fact, footnote 5 tries to make a point that a denial of a reconsideration petition is not a modification of the original order.¹ As discussed at ¶ a.1 of Mr. Small's March 30, 2001 *Petition for Reconsideration and Request for Protection*, but uncommented upon by the Commission,² the Commission's rules at 47 C.F.R. § 1.429 do not state that a denial of a petitions for reconsideration will be published in the Federal Register and 47 C.F.R. § 1.427(a) contemplates Federal Register publication only for "any rule issued by the Commission." Because the *MO&O* did not appear to issue a new rule, and in the absence of any statement to the contrary in the *MO&O*, it was reasonable to conclude that Federal Register publication of the *MO&O* might not occur.

2) 47 C.F.R. § 1.106(b)(1) provides, in a circular fashion, that "for all documents in notice and comment and non-notice and comment rulemaking proceedings required by the Administrative

¹ As explained at ¶ 18 of the *Petition for Reconsideration and Second Motion to Reopen the Record*, the *MO&O* incorrectly states that 47 C.F.R. § 1.106(k)(3) provides that a ruling denying reconsideration "is not subject to further reconsideration."

² Mr. Small raised similar comments in his January 2, 2002 *Statement for the Record, Motion for Protection, and Request for a Prompt Order Defining the Opposing Party's Filing Rights* and the Commission failed to comment upon those concerns as well.

Procedure Act, 5 U.S.C. §§552, 553, to be published in the Federal Register, including summaries thereof, the date of publication in the Federal Register” establishes the public notice date. § 1.106(b)(1) does not provide that every document released by the Commission in a rulemaking proceeding will be published in the Federal Register. § 1.106(b)(1) merely provides that documents “to be published in the Federal Register” will utilize the Federal Register publication date as the public notice date. § 1.106(b)(1) leaves the public to guess whether Federal Register publication will occur at any given point in a review proceeding.³ Given the lack of clarity in the Commission’s rules regarding Federal Register publication and absent a statement in the *MO&O* that Federal Register publication would occur, and given the Commission’s stringent application of its rule dismissing untimely petitions for reconsideration, *see e.g., Ole Brook Broadcasting, Inc.*, 15 FCC Rcd. 20644 ¶ 2 (FCC 2000) (“we have held consistently that we are without authority to waive or extend, even by as little as one day, the statutory 30-day filing period for petitions for reconsideration, absent extraordinary circumstances . . .”),⁴ it was reasonable for Mr. Small to file his August 19, 2002 *Petition for Reconsideration and Second Motion to Reopen the Record* without waiting for Federal Register publication.

3) The subject *MO&O* was released to the public on July 25, 2002. In the absence of Federal Register publication, petitions for reconsideration were due thirty days later, by August 24, 2002, extended to August 26, 2002 because August 24, 2002 was a Saturday. Mr. Small filed his *Petition*

³ For instance, it does not appear that the Commission published its November 8, 2001 *Memorandum Opinion and Order*, FCC 01-324, in the Federal Register even though it is a document released in a notice and comment rulemaking proceeding.

⁴ While the Commission’s unclear Federal Register publication rules might provide an “extraordinary circumstance” were Mr. Small to wait for Federal Register publication which never occurred, it is prudent to avoid the test when possible.

for Reconsideration and Second Motion to Reopen the Record on August 19, 2002. It was not until August 30, 2002, more than 30 days after the release of the subject *MO&O*, and after Mr. Small had filed his *Petition for Reconsideration and Second Motion to Reopen the Record*, that the Commission published the subject *MO&O* in the Federal Register. 67 FR 55729.

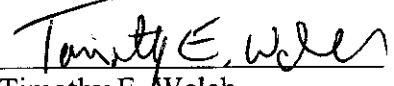
4) The Federal Register publication contains information which is not provided in the subject *MO&O* as released to the public on July 25, 2002. The Federal Register provides that “this denial is effective August 30, 2002.” 67 FR 55730. 47 C.F.R. § 1.103(a) provides, in a circular fashion, that the effective date of a Commission action “shall be the date of public notice of such action as that latter date is defined in §1.4(b) of these rules,” but as discussed above, § 1.4(b) leaves the public guessing, before Federal Register publication actually occurs, whether a review order in a rulemaking proceeding would be published in the Federal Register. Adding confusion to the situation is that §1.103(a) provides that “the designation of an earlier or later effective date [relative to the public notice date] shall have no effect on any pleading periods.” It is not at all clear whether the designation of August 30, 2002 as the “effective date” of the subject *MO&O* is intended to affect the timing of the pleading cycle associated with the subject *MO&O* which had been released to the public more than 30 days earlier on July 25, 2002. To confuse matters even further, while footnote 5 of the subject *MO&O* states that there was no modification to the original order, the Federal Register publication provides a conflicting statement that the Commission’s action denying Mr. Small’s December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* is a “final rule” as if the subject *MO&O* affected a modification to the prior rule. 67 FR 55729.

5) In view of the foregoing, it is not clear what the Commission intends to be the public notice date in this proceeding for the purpose of seeking relief. In order to avoid an argument that

his August 19, 2002 *Petition for Reconsideration and Second Motion to Reopen the Record* was somehow premature and not reviewable by the Commission, Mr. Small is resubmitting concurrently herewith his August 19, 2002 *Petition for Reconsideration and Second Motion to Reopen the Record* and his August 24, 2002 *Motion for Leave to File Supplement to Petition for Reconsideration and Second Motion to Reopen the Record* as protective filings to ensure that those arguments are considered by the Commission and not dismissed pursuant to some interpretation of the confusing maze of Commission rules described above. Except for changing the dates on the pleadings, no changes have been made to the substance of the pleadings. Because the substance arguments in the earlier pleadings are unchanged, and because the Commission's rules are unclear regarding whether a review order is to be published in the Federal Register, the Commission should determine that Mr. Small's reconsideration arguments are timely filed either as filed on August 19, 2002 or as filed concurrently herewith.

Hill & Welch
1330 New Hampshire Ave., N.W. #113
Washington, D.C. 20036
(202) 775-0070
(202) 775-9026 (FAX)
welchlaw@earthlink.net
September 3, 2002

Respectfully submitted,
PRESTON W. SMALL


Timothy E. Welch

His Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of September 2002 served a copy of the foregoing STATEMENT FOR THE RECORD, MOTION FOR PROTECTION, AND NOTICE OF RESUBMISSION OF PETITION FOR RECONSIDERATION AND SECOND MOTION TO REOPEN THE RECORD AND NOTICE OF RESUBMISSION OF MOTION TO FOR LEAVE TO FILE SUPPLEMENT, by First-Class United States mail, postage prepaid, upon the following:

Mark N. Lipp
Shook, Hardy and Bacon
600 14th Street, N.W. Suite 800
Washington, D.C. 20005-2004

Kathy Archer, Vice President
CapStar Broadcasting Partners
600 Congress Avenue #1400
Austin, TX 78701

Joan Reynolds
Brantley Broadcast Associates
415 North College Street
Greenville, AL 36037

James R. Bayes
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Kevin F. Reed
Dow Lohnes & Albertson PLLC
1200 New Hampshire Ave., N.W. #800
Washington, D.C. 20036

Erwin G. Krasnow
Verner Liipfert Bernhard McPherson and Hand
901 15th Street, N.W.
Washington, D.C. 20005


Timothy E. Welch